IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 23RD JULY 2007 / 1ST SRAVANA 1929

AS.No. 76 of 1994(A)

OS.535/1991 of I ADDL.SUB COURT, KOZHIKODE

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APPELLANTS: PLAINTIFFS:

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* 1. T.V.VIMALA, W/O.LATE T.V.NARAYANAN (DIED)

(IT IS RECORDED THAT FIRST APPELLANT DIED AND APPELLANTS 2 TO 5 ARE HER LEGAL HEIRS, VIDE ORDER DT.30.5.2006 IN MEMO DATED 7.12.1998, C.M.P.No.18953/1998)

2. T.V.LATHEESH, S/O.LATE T.V.NARAYANAN

* 3. T.V.LASEETHA, D/O.LATE T.V.NARAYAHNAN (DIED)

4. T.V.SUPRIYA, D/O.LATE T.V.NARAYANAN

5. T.V.SUDEESH, S/O. LATE T.V. NARAYANAN

ALL ARE RESIDING AT THEKKEVEETTIL HOUSE, THUVASSERITHOTTAM PARAMBA, P.O.OLAVANNA CALICUT - 673 025.

ADDL.6. K.C.GOPALAN, S/O.LATE T.V.LASEETHA, AGED 47 YEARS, CHOYIMADATHIL HOUSE P.O. FEROKE, CALICUT 673 631.

ADDL. 7. LINCY K.C., D/O.LATE T.V.LASEETHA, (MINOR) AGED 15 YEARS, CHOYIMADATHIL HOUSE P.O. FEROKE, CALICUT 673 631.

ADDL. 8. DEEPAK LAL, S/O.LATE T.V.LASEETHA, AGED 13 YEARS, (MINOR) .DO. .DO.

ADDL. 9. GOPIKA, D/O.LATE T.V.LASEETHA, AGED 8 YEARS, -DO- -DO-

(MINORS REPRESENTED BY FATHER AND GUARDIAN, K.C.GOPALAN)

(APPELLANTS 6 TO 9 ARE IMPLEADED AS LEGAL REPRESENTATIVES OF DECEASED 3RD APPELLANT VIDE ORDER DATED 14.10.99 IN C.M.P.NO.5426/99 IN C.MP.NO.8085/1998)

BY ADV. SRI K.P.DANDAPANI
SUMATHY

RESPONDENTS: DEFENDANTS:
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* 1. C. MUHAMMED S/O.MAMMED
PUNATHILMEETHAL, OLAVANNA AMSOM DESOM,
P.O.GURUVAYURAPPAN COLLEGE, CALICUT (DIED)

2. ABDUL SALAM, S/O.AHAMMED
VELLARIKKAL HOUSE, OLAVANNA AMSOM, DESOM,
CALICUT.

3. CALICUT CORPORATION,
REPRESENTED BY ITS COMMISSIONER, CALICUT.

ADDL.4. KADEESA, C/O.VELLARIKKAL MOHAMMAD,
FISH MERCHANT, KALLIKUNNU,
ODUMPRA, P.O.OLAVANNA,
CALICUT - 673 025.

(ADDL. R4 IS IMPLEADED AS THE LEGAL REPRESENTATIVE OF THE DECEASED FIRST RESPONDENT AS PER ORDER DT. 14.10.99 ON C.M.P.NO.8085/1998)

BY ADV. SRI M.C.SEN-R2, SAHANA KORTHI KOYA.
SRI.ESM.KABEER
PRAKASH THOMAS

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 23/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

A.S.No.76 of 1994

Dated this the 23rd July, 2007.

J U D G M E N T

The plaintiffs in O.S.No.535/1991, on the file of the Subordinate Judge's Court, Kozhikode, are the appellants. The appeal is filed against the judgment and decree passed by the trial court dismissing the suit filed by appellants claiming damages against respondents. When the matter came up for hearing before this Court on 27.3.2007, after hearing the matter for some time, this Court took a view that an earnest effort shall be made for an amicable settlement through the Lok Adalath conducted by the High Court. Accordingly, the matter was referred to Lok Adalath. Appellants and the authorised representative of the 3rd respondent Corporation appeared before the Lok Adalath . Lok Adalath returned the records noting that there is no possibility for settlement. Accordingly, the matter was heard.

2. The brief facts required for the disposal of the appeal are as follows. The first appellant is the widow and other appellants are children of the deceased T.V.Narayanan. They filed the suit claiming damages against respondents alleging that at about 4.30

p.m. on 18.8.90, Late Narayanan alighted from a bus which was stopped in front of the railway road, to proceed to S.M.Street, through the side of the road. Granite boulders were kept on the side of the road, and the first defendant was crushing those boulders into pieces of smaller size for the purpose of using the same in the construction of the road. It was averred that the first respondent was employed by the second respondent. Due to the impact of hit with hammer, a splinter of rock flew from the boulder, which hit against the left eye of Narayanan. He was taken to Beach Hospital, and from there to Medical College Hospital, emergency operation was conducted and he was discharged on 5.9.90. As there is no improvement in the situation, he was re-admitted in the hospital on 13.9.1990 and discharged on 19.9.1990. It was averred that Narayanan lost sight of his eye on account of the accident. His condition became worse and he was re-admitted in the Medical College Hospital on 20.10.1990. While undergoing treatment, he died on 11.11.1990. According to the appellants, illness and subsequent death were all direct and immediate consequences of the injury sustained. They filed the suit claiming compensation of Rupees One Lakh.

3. The first defendant/first respondent filed a written statement contending that he was not an employee of the second respondent. The averment that on account of his negligence, Narayanan sustained injuries was denied. It was contented that he was not employed by the second respondent for converting boulders into small pieces. It was also contented that he was not doing work on 18.8.1990. He further contented that on the strength of a complaint filed by the appellants, a criminal case was registered against the him, and after trial he was acquitted. He was not aware that the second defendant was a Contractor. The quantum of compensation claimed was denied.

4. The second defendant also filed a separate written statement contending that he had not employed the first defendant. The averment that first defendant was crushing stones on 18.8.1990 and deceased Narayanan sustained injuries on account of the negligent act of the first defendant was denied. It was admitted that he submitted a tender for the work, but the same was accepted only on 14.8.90. Memo accepting the tender was issued to him on 18.8.1990, which was received by him on 20.8.1990. The work commenced only

on 22.8.1990. He pleaded ignorance about the incident, which is alleged to have been taken place on 18.8.1990. There was no negligence on the part of the second defendant. The liability is disputed, especially on the ground that the first defendant was not employed by him.

5. Third defendant also filed a written statement contending that he had no knowledge about the alleged incident. He contented that second respondent executed an agreement only on 29.8.1990, and work was entrusted to him only thereafter. It was contented that repairing work of Telecom and Railway were also carried out in the relevant point of time, and 3rd respondent was not liable for the amount of compensation claimed. The Trial Court held that the appellants fail to prove that Narayanan sustained injuries on account of the negligent act of the first defendant. It was also found that in fact the work was awarded to the second respondent only on 20.8.1990, and he started the work only on 22.8.1990, and dismissed the suit. Challenging that judgment and decree, this appeal is filed.

6. During the pendency of the appeal, first respondent died and his legal representatives were impleaded as additional respondents 6 to 9 in the appeal.

7. The points arise for consideration in this appeal are,

(a) Whether the finding of the court below that the appellants failed to establish that the deceased Narayanan sustained injuries on 18.8.1990, on account of the negligent act of the deceased first respondent, was correct, and,

(b) Whether the finding that the appellants were not entitled to get any compensation is correct.

For the sake of convenience, both these points can be considered together.

8. The case put forward by the appellants was that the deceased Narayanan sustained the injury to his left eye on 18.8.1990. According to them, the deceased sustained injury due to the hitting of a splinter stone from a Granite boulder, which was broken into pieces

by the first respondent using a metal hammer. It was contented that granite boulders were stored on the side of the road for construction of a road. According to the appellants, the work of the road was entrusted to the second respondent by the 3rd respondent, Corporation. Further case was that the first respondent was an employee of the second respondent, and since Narayanan sustained injury on account of the negligent act of the first respondent, the second respondent who was the employer of the first respondent is vicariously liable for the tortious act.

9. The specific case put forward by the appellants is that the deceased Narayanan alighted from the bus at about 4.30 p.m. on 18.8.1990. He was walking towards S.M.Street through the side of the road. It was averred that at that point of time, first respondent was breaking granite boulders using a hammer, and due to the impact of hitting, a splinter flew away from the granite stone, which hit against the left eye of the deceased. The evidence on record clearly establishes that deceased Narayanan sustained an injury due to actional contact of granite splinter which hit against his left eye on the evening of 18.8.1990. The next question arising for consideration is

whether Narayanan sustained injuries on account of the rash or negligent act of the first respondent. The second respondent was a contractor, who accepted the work. According to respondents 2 and 3, tender was accepted only on 14.8.1990 and the intimation regarding the acceptance of tender was given to the second respondent only on 20.8.1990, and he commenced the work on 22.8.1990. This fact is spoken to by the 3rd respondent also. So, there is absolutely nothing on record to show that on 18.8.1990, any employee of the second respondent was engaged in any kind of work at the place of incident.

10. PW.1 is the doctor attached to the hospital to prove the case of injury. PW.2 is the second plaintiff. Admittedly, he was not an eye witness. PW.3 is an eye witness. It is true that he gave evidence to the effect that Narayanan sustained injuries due to the hitting of splinter stone. He deposed that for the first time, he gave evidence, as to the person who caused the injury, before the Court. He also deposed that he had given the evidence after seeing the plaintiffs. He saw Narayanan sitting on the road. He then enquired the matter, and Narayanan told him that a splinter stone hit on his left eye. He further deposed that he was unable to tell whether that information

was true or not. PW.4 only speak about the news item which appeared in the Malayalam Daily. PW.5 is the photographer. PW.6 is the autorickshaw driver who took the injured to the hospital. In the chief examination itself, he denied the suggestion that he had seen the incident. So, the evidence of PW.6 is of no use.

11. The only evidence available on record is that of PW.3. In view of the inconsistent versions given by him, I do not think, it is safe to decide the case solely based on the evidence of PW.3. So, I do not find any reason to interfere with the findings of the court below that the appellants failed to prove that it was the first defendant who caused injuries to the deceased Narayanan. Even assuming that the injuries were caused by him, there is absolutely no material to connect the first respondent with the second respondent. So, if at all first respondent can be made liable, he can be made liable only on his individual capacity. He died and he was a coolie worker. So, I do not think, any useful purpose will be served by remanding the case, to adduce further evidence. So, the appeal is only to be dismissed.

In the result, the appeal is dismissed. The parties are directed to suffer their costs.

C.M.P.No.47/1994 in A.S.No.76/1994 is dismissed.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

A.S.No. 76 of 1994

J U D G M E N T

Dated: 23rd July, 2007.